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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 217.

The State of Louisiana ex rel. The Southern Bank,

Plaintiff in Error,

v.

Edward Pilsbury, Mayor, et al.,

Defendants in Error.

In Error to the Supreme Court of the State of Louisiana.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

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STATE OF LOUISIANA, *ex rel.* THE SOUTHERN BANK,
Plaintiff in Error,

v.

EDWARD PILSBURY, Mayor, &c., *et al.*,
Defendants in Error.

In Error to the Supreme Court of the State of Louisiana.

Supplemental Brief for Plaintiff in Error.

Two or three points made by the defendants in error in their brief, filed since the preparation of our former brief in this case, seem to call for a further discussion.

I.

Defendants in error claim that this Court has no jurisdiction, because the Supreme Court of Louisiana held the Act of 1852, creating the consolidated debt, to be unconstitutional, so far as

the tax was concerned, and held that there was no contract. Hence it is claimed that the question whether the subsequent Acts of the Legislature impaired the contract cannot be considered by this Court.

In other words, the contention of counsel for defendants in error is that the construction placed by the Supreme Court of Louisiana, in this case, upon the statute of 1852 is not reviewable by this Court, and that Court having decided that the statute of 1852 did not create a valid contract, a writ of error will not lie to this Court to review such decision.

This is a fallacy on the part of the defendants in error.

The same argument has been repeatedly made in previous cases, and this Court has emphatically and unequivocally asserted its jurisdiction.

Thus, in the case of *Jefferson Branch Bank vs. Skelley*, 1 Black, 436, which was a writ of error to the Supreme Court of Ohio, it appeared that the State Bank of Ohio, was incorporated in 1845, by a Special Act of the Legislature. The 60th section of the act provided that six per cent. of the dividends should be set off for the use of the State, in lieu of all taxes. By the State Constitution, adopted subsequently to this Act, it was provided that a higher tax might be imposed upon all banks beyond that stipulated for in the Act of 1845; and in 1852 an Act was passed taxing the bank.

Plaintiff in error claimed in the Court below, that this latter Act impaired the validity of the contract in the Act of 1845.

The State Court held that the Act of 1845 did not constitute a contract.

This Court held that the construction placed by the State Court on the Act of 1845, was not binding on this Court, and this Court could consider whether or not it did constitute a contract, and whether the Act of 1852 impaired it.

So, in *Bridge Proprietors vs. Hoboken Company*, 1 Wallace, 116, it was held that where a State statute creates a contract, and a subsequent statute is alleged to impair its obligation, and the State Court construes the first statute in such a manner as that the second does not impair it whereby the second statute is held valid, the validity of the latter statute is called in question, and the decision sustaining it can be reviewed by the United States Supreme Court, on writ of error.

So, in *Furman vs. Nichol*, 8 Wallace, 44, the same question

was raised, and Davis, J., says, page 58: "The defense really "amounts to this, either that the alleged contract did not exist, "or if it did, that there has been no legislation that impairs it.

"Whether it be true or false, depends upon the construction "to be given the laws of the State, which are claimed as prov- "ing the making of the contract and its violation.

"If so, this Court decides for itself whether the construc- "tion which the Court below gave to these different statutes "was correct or incorrect; and we are required to reverse under "the twenty-fifth section of the Judiciary Act, if we find that, "under an error of construction, that Court has adjudged that "no contract has been impaired. To do otherwise, would be to "surrender to the State Courts an important trust confided to "this Court by the Constitution."

And this Court accordingly did reverse the judgment of the Supreme Court of Tennessee, although that Court had held that there was no contract created by the original statute.

So, in *Delmas vs. Insurance Co.*, 14 Wallace, 661, where the Court says, by Miller, J., page 668: "This Court has always jeal- "ously asserted the right, when the question before it was the "impairing of the obligation of a contract by State legislation, "to ascertain for itself whether there was a contract to be im- "paired. If it were not so, the constitutional provision could "always be evaded by the State Courts giving such construc- "tion to the contract, or such decisions concerning its validity, "as to render the power of this Court of no avail in upholding "it against unconstitutional State legislation."

Without further reviewing the decisions of this Court, it is sufficient to call attention to the recent case of *Railroad Co. vs. Falconer* (103 U. S., 821), where the Court of Appeals of New York had held that there was no contract created, and therefore that a constitutional amendment did not impair it, and it was held that this Court had jurisdiction to review the decision of the State Court.

II.

Counsel for defendants in error undertake to explain away the decisions of the Louisiana Supreme Court to the effect that the constitutional provision as to taxation being "equal and uni-

form throughout the State," does not apply to municipal taxation.

We shall therefore review the cases in detail:

The case of the *Second Municipality of New Orleans vs. Duncan* (2 La. Ann., 182), involved the question of the validity of an ordinance of one of the municipalities of New Orleans, passed in 1846, imposing a special tax of one per cent. on real estate.

The tax was claimed to be unconstitutional, as being in conflict with Art. 127 of the Const. of 1845, which provided that "taxation shall be equal and uniform throughout the State." This is precisely the same language as appears in the Constitution of 1852.

The Court says, by Eustis, C. J. (p. 183): "That article, by its very terms, applies to State and not to municipal taxes. It provides for the equality and uniformity of taxation *throughout the State*.

"As an approximation to either of these objects would be impossible without a general valuation of the property to be taxed, the article provides for the postponement of its operation until after the year 1848, thus giving time for the Legislature to provide the machinery to carry into effect a principle which has hitherto been a standing monument of the impotency of civil government, in applying to the complicated facts of society abstractions, however true, just and important they may be. As we have had occasion to observe recently, in the case of *Egerton v. The Third Municipality*, 1 Ann. Rep., 435, the framers of this Constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants, and their corporate existence is recognized and continued as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left, in *statu quo*, with the Legislature; *and the convention confined itself to providing for the State Government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control.*"

It is claimed by counsel for the defendants in error that this is a mere *dictum* of the Supreme Court of Louisiana, because they held that the constitutional provision did not go into effect until after the year 1848, the decision being made in 1847.

It is very clear, however, that the Court meant to give an authoritative exposition of the constitutional provision. The clause in which they stated that the operation of the article in question is postponed until after the year 1848, is merely inserted *arguendo*, for the purpose of enforcing their views as to the meaning of the provision in question.

The decision is put squarely upon the ground that the constitutional provision did not apply to municipalities.

In *Lafayette vs. Cummins*, 3 Ann. Rep., 673, the question of the validity of a municipal tax upon the defendant, on account of his occupation and trade as a butcher, was discussed. The Court said, by Eustis, C. J.: "It is contended that the imposition of the tax attempted to be executed is contrary to the 127th Article of the Constitution, which provides for the equality and uniformity of taxation *throughout the State*.

"In the Case of *Duncan vs. The Second Municipality*, this question, after a very thorough argument, was determined by this Court, and the article was held applicable only to State and not to municipal taxes (2 Ann. Rep. 182).

"The opinion of the Court in that case meets also another objection taken by the counsel for the defendant to the legality of the tax, on the ground that all trades, occupations and professions are not subject to it. The tax in *Duncan's* case was a special tax on real estate and slaves, and was imposed under a law of 1805, authorizing the City Council of New Orleans to tax real and personal estate, and it was obviously unequal in its operation, inasmuch as all personal property was exempt from it; yet the Court held that the tax was not illegal.

"The statute of 1846, under consideration, imparts no prohibition of discrimination in the objects of taxation, which is an administrative question of great importance; and where the tax is laid on persons in the same class, that is, all those exercising certain trades, occupations, or professions, we know of no instance in which it has been held to be other than legal and valid."

This decision is clearly in point.

The fact, if it be a fact, that the Court does not rest its decision entirely upon the question as to whether the Constitution applies to municipal taxes, does not make the decision *obiter* on this point. Where a court places its decision squarely on two dif-

ferent grounds, neither of those grounds is *obiter;* each is of equal importance with the other, and unless the Court chooses to say that it rests its decision entirely upon one of them, they are both authoritative.

For an excellent definiton of the term *obiter dicta*, see opinion of Folger, J., in *Rohrbach vs. Germania Fire Ins. Co.*, 62 N. Y., 58: "*Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself (4 Burr., 2064–2068); *obiter dicta* are such opinions uttered by the way, not upon the point or question pending (*Rouse vs. Moore*, 18 J. R., 407–419), as if turning aside for the time from the main topic of the case to collateral subjects."

Resuming the review of the decisions of the Louisiana Supreme Court, we find that in *Buffington vs. Dinkgrave* (4 Ann. Rep., 548),a municipal tax on peddlers and hawkers was upheld, the Court saying: "We will dismiss the ground of unconstitutionality by reason of the inequality of the tax with a simple reference to the cases of the *Second Municipality vs. Duncan* (2d Ann., 182), and *The City of Lafayette vs. Cummins* (3d Ann., 674), in which the same question was thoroughly examined and decided adversely to the plaintiff's pretensions."

In *Municipality Number Two vs White* (9 La. Ann., 446), the Court, by a vote of three to two, Slidell, C. J., and Campbell, J., dissenting, held that an act authorizing the City of New Orleans to open streets, and directing that the owners of property adjacent thereto should be assessed for their respective portions of the benefit derived from the improvement, was unconstitutional, such assessment being unequal and not being uniform.

The dissenting Judges argued that as articles 105 and 123 of the Constitution then in force were taken literally from the Constitution of 1845, it must be presumed that the framers of the present Constitution were aware of the construction they had received from the Supreme Court, and intended in the new Constitution they should have the same meaning and effect.

The Chief Justice called attention, in his opinion, to the fact that three of the Judges who had taken part in the previous de-

cisions were members of the convention of 1845, who had framed the Constitution.

In *New Orleans vs. Elliott*, 10 La. Ann., 59, the Court unanimously sustained the validity of an ordinance of the City of New Orleans, imposing upon the proprietor one-third of the expense of paving the street in front of his property. The majority opinion, by Ogden, J., states that the Court adheres to the opinion expressed in the Case of *Municipality No. Two*, 9 Ann., 446, to the effect that the constitutional provision in relation to taxation applies to municipal taxation. But the opinion proceeds to distinguish that case from the one before the Court. The opinion of Slidell, C. J., however, concurred in by Spofford, J., while it concurs in the result of the majority, reiterates the views of the Chief Justice as to the constitutional provision, saying: "It is said to be repugnant to Art. 123 of the Constitution of 1845, which declares 'that taxation shall be equal and uniform throughout the State.' *It was repealedly held by our predecessors that the clause in question was applicable only to State, and not to municipal taxes.* (*Lafayette vs. Cummins*, 3 Ann., 148. *Duncan vs. Second Municipality*, 2 Ann., 182.) I refer also to my opinion in the Benton Street case."

In *City of New Orleans vs. Cannon*, 10 Ann., 764, the 37th section of the Consolidation Act (*the very section we now seek to enforce*), requiring this special tax of $600,000 on real estate and slaves, was before the Court, and was *assumed to be valid*, though the question was not discussed, the Court discussing another point, namely, as to the validity of certain proceedings taken to collect the tax.

This case, however, is authority in favor of the validity of the law itself, as otherwise the proceedings to collect the tax would themselves have been invalid.

In *Yeatman vs. Crandall*, 11 Ann. Rep., 220, the Court *expressly overrules* the decision in *Second Municipality vs. White*, 9 Ann., 446, which was the only case up to that time which had held that the constitutional provision in question applied to municipalities. The Court says, in this case, that "*the Constitution refers to State taxation only*, in its proper

sense, *for general or State purposes.* When it says that taxation shall be equal and uniform *throughout the State*, it points directly to its object, which is *to regulate the mode of filling the State Treasury.*"

This judgment is assented to by all the Judges except Buchanan, J.

Voorhies, J., who took part in the former decision of *Second Municipality vs. White*, concurring with the majority in that case, expressly retracts in this case his views expressed in the former case, saying that he has been led to reconsider the opinion to which he assented in that case.

(For a fuller discussion of this case, see our main brief, page 29.)

In the *New Orleans Draining Company Matter*, 11 Ann., 338, the question of the validity of an assessment for draining was considered.

The case was twice argued in the Supreme Court.

On the first occasion, Mr. Justice Buchanan pronounced the judgment of the Court, Mr. Justice Spafford dissenting, and Chief Justice Slidell excusing himself, having an interest in the cause.

There was an application for a rehearing, and, pending the application, Chief Justice Slidell and Mr. Justice Ogden resigned their seats upon the bench, and Merrick, C. J., and Lea, J., were elected in their places. The rehearing having been granted, Merrick, C. J., delivered the opinion of the Court, all the Judges concurring with the exception of Buchanan, J., who adhered to his previous opinion.

Buchanan, J., enumerates four points of unconstitutionality, the first of which is, that the Charter taxes a portion of the community only for a work beneficial to the public at large, which is against the principle of equality and uniformity in taxation, contained in Article 123 of the Constitution of 1852.

After enumerating the other three points, he says: "Of these points it is only necessary to examine the first. Tested by the doctrine of the majority of this Court in the *Benton Street* case, 9th Ann, 444, it must prevail."

The opinion of the Court on the second argument, by Merrick, C. J., is found at page 370, in which they overrule the pre-

vious decision and cite the case of *Yeatman vs. Crandall*, 11th Ann., already referred to, which they say was decided since the preceding portion of this opinion was prepared (see page 373).

In *Surgi vs. Suetchman*, 11 Ann., 387, the Court follows and approves of the previous cases of *Yeatman vs. Crandall* and *The New Orleans Draining Company*.

In *Jamison vs. The City of New Orleans*, 12 La. Ann., 346, the Court refers to the cases of *Yeatman vs. Crandall*, 11 Ann., 220, and *The Draining Company*, 11 Ann., 370, as having overruled the case of *White vs. Municipality No. Two*, 9 Ann., 446.

The case of *Layton vs. The City of New Orleans*, 12 Ann., 515, does not discuss the question of the constitutional provision as to equality and uniformity, but turns solely on the question whether the State Legislature had the constitutional power to change the method of assessing the Consolidated Loan Tax (see this case discussed fully in our main brief, at page 30).

In *Wallace vs. Shelton*, 14 La. Ann., 503, the case of *Yeatman vs Crandall*, 11th Ann., 220, is reaffirmed, the Court saying, by Merrick, C. J.: "It cannot be denied that the proper construction of Article 123 of the Constitution has occasioned this Court much perplexity. The decisions, until recently, at least, have been rendered by a divided bench, and the present doctrine of the Court upon the construction of Article 123 of the Constitution of 1852, was preceded by two decisions the other way. But the questions arising in the *Yeatman* case were decided after full consideration of the subject. We had not only the aid of the arguments of the learned counsel in that case, but the case of the *Draining Company* was then under advisement on a rehearing, in which we had the assistance of a number of the most distinguished and experienced counsel of this city. The conclusion arrived at in the case of the *Draining Company*, was after the most mature deliberation. The decree was also concurred in by four Judges. This case was followed by the two cases of *Surgi vs. Suetchman*, and *Surgi vs. Battalord*, affirming the same doctrine, 11 Ann., 387.

"After those decisions, which were in conformity with those

under the Constitution of 1845, we had hoped the question would be considered as at rest."

This brings us down to the year 1859, and, up to this point, there had been but one decision of the Supreme Court of Louisiana which held that this section of the Constitution applied to municipal taxation, and that case had been overruled by the subsequent decisions of the Court.

The Courts and people of the State seem to have acquiesced in these decisions, for we hear nothing more on the subject until the year 1868, when the Court, in the *Matter of the City praying for the Opening of Streets*, 20 Ann., 497, approves and follows *Yeatman vs. Crandall, The Draining Company*, and *Wallace vs. Shelton*.

It is true that this decision, as well as some of those which preceded, had to do with assessments, and, therefore, the Court might have put it solely on that ground; but the Court does not in fact put it solely on that ground. It puts it on the ground originally laid down in the *Municipality vs. Duncan*, 2 Ann., that the constitutional provision does not apply to municipal taxation.

To the same effect is *Daniel vs. The City of New Orleans*, 26 La. Ann., 1.

In 1875, however, the Supreme Court of Louisiana, in the case of the *City of New Orleans vs. Cazelar*, 27 Ann. Rep., 156, suddenly discovers that this provision of the constitution does apply to municipal taxation, and without taking the trouble to discuss the previous decisions, and without even so much as a word of reference to the case of *Second Municipality vs. Duncan*, or the case of *Lafayette vs. Cummins*, or any of the other cases previously decided, it lays down the principle "that a legislature may, without the infringement of constitutional rights, extend the boundaries of a city and embrace new territory, but that it is without power to authorize the city to levy any other than a uniform and equal tax on all property alike."

It appeared, however, in the case, that the city charter of 1870 did require the City Council to lay an equal and uniform tax upon all real and personal property in said city, and the Court held that such a tax had, in fact, been laid, and they therefore upheld the constitutionality of the tax. So that this decision is a pure *dictum* on this particular point, even if it were otherwise authoritative.

This is absolutely the only case lending any color of authority to the position of the defendants in error, prior to the case at bar, except the case of *Second Municipality vs. White*, which was expressly overruled. So that even if the decisions cited in our favor were merely *dicta* they would be controlling upon this Court, in the absence of decisions to the contrary. But, as we have already seen, they are in no sense *dicta*, but are authoritative decisions binding upon the Courts of Louisiana and upon this Court.

III.

With regard to the case of *Gillman vs. Sheboygan*, 2 Black, 510, which is greatly relied upon by the defendants in error as construing the Constitution of Wisconsin on this subject, it is to be observed:

FIRST. This Court simply followed the decisions of the Supreme Court of Wisconsin, which were binding upon it.

SECONDLY. The provision of the Wisconsin Constitution was essentially different from that of the Constitution of Louisiana.

The provision in question was: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." (See Section 1, Article 8 of Constitution of 1848, 2 Poore's Federal and State Constitutions, 2037).

The clause in the Louisiana constitution is to the effect that taxation shall be equal and uniform *throughout the State*, and for this reason it was held in *Second Municipality vs. Duncan*, and the other cases, that the clause did not apply to municipal taxation.

These words, "*throughout the State*," are omitted in the Wisconsin Constitution.

The same thing is true as to other constitutions where similar decisions are made to those which were made in Wisconsin.

But even if the provision of the Constitution of Wisconsin was precisely the same as that of the Constitution of Louisiana, and even if the decision of the United States Supreme Court was in point, that Court would, nevertheless, disregard its opinion in the Wisconsin case, and follow the decisions of the Supreme

Court of Louisiana, on the principle too well settled in this Court to need citation of authorities, namely, that the decision of the highest Court of the State, upon a construction of its own Constitution, is binding upon this Court, except where there is a question as to whether such decision impairs the obligation of a contract. *A fortiori*, this Court will follow the decisions of the Supreme Court of Louisiana, where contracts have been made on the faith of such decisions (see authorities cited on this point in our main brief).

IV.

The case of *Wolff vs. New Orleans*, 103 U. S., 358, decided since our main brief was written, has a direct application to some of the questions involved in this case. The Court in that case holds that laws are void which withdraw, or restrict, the taxing power of the City of New Orleans so as to impair the obligation of her contracts made upon a pledge expressly or impliedly given that it should be exercised for their fulfillment; and although such laws be enacted, *mandamus* to compel her to exercise that power to the extent she possessed it before their passage, will lie, at the suit of a party to such a contract, who has no other adequate remedy to enforce it.

The Court in this case also severely criticizes and condemns the Premium Bond Act, referred to in the briefs on both sides in the case at bar.

The relator in this case of *Wolff vs. New Orleans* had obtained a judgment upon bonds issued by the city in payment for stock of a railroad. The act authorizing the issue of the bonds made no provision for the ultimate payment of the principal by taxation, but provided that a special tax should be levied each year to pay the annual interest.

The Court followed the decision in *United States vs. New Orleans*, 98 U. S., 381, which held that the relator was entitled to a *mandamus* to compel the city authorities to levy a tax to pay judgments recovered on similar bonds, although there was no express law authorizing such taxation.

The Court also reiterated the doctrine of the case of *United States vs. New Orleans*, to the effect that the passage of the act

of the Legislature authorizing the issue of the city bonds was an implied authority to tax, which implied authority became part of the contract.

Counsel for the city, however, urged against the granting of the *mandamus*, that the power of the city to levy a tax upon property for all purposes, was limited by acts of the Legislature, to a dollar and fifty cents on every hundred dollars of valuation, and that the amount thus raised was insufficient to meet the current expenses of the city, and pay previous judgments of other parties. They cited the charter of 1870, which required a budget to be made in December of each year, exhibiting the various items of liability and expenditure for the ensuing year, and the Act of March 6, 1876, which limits the right of taxation upon property by the city, to one dollar and fifty cents on every hundred dollars of its assessed value. They also insisted that the conditions on which judgments against the city are to be paid are prescribed in Act No. 5 of the extra session of 1870, which provides that no writ of execution, or *fieri facias*, shall issue from any of the Courts of the State to enforce the payment of any judgment against the city; but the plaintiff may cause a certified copy of it to be filed in the office of the Controller of the city; that, thereupon it shall be the duty of the Controller, or auditing officer, to cause the same to be registered, and to issue a warrant upon the Treasurer, or disbursing officer of the corporation, for the amount, without any special appropriation of money therefor, "provided always that there be sufficient money in the treasury to pay such judgment, specially designated and set apart for that purpose in the annual budget."

"The act further provides that in case the amount designated in the annual budget for the payment of judgments shall be exhausted, the Common Council shall have power, *if they deem it proper*, to appropriate from the money set apart in the budget for contingent expenses, a sufficient sum of money to pay said judgment or judgments, but if no such appropriation be made by the Common Council, then all judgments shall be paid in the order in which they shall be filed and registered in the office of the Controller, from the first money *next annually* set apart for that purpose."

The Court says: "The balance remaining is, and, with that limit of taxation, always will be insufficient to pay any considerable portion of the earliest judgments against the city. So

the relator must wait for an indefinite period—perhaps until the Statute has barred her claim—and take the uncertain chance of obtaining from the city in the distant future any portion of the sum due to her" (page 363).

The Court then proceeds to discuss the Premium Bond Act: "The Act of March 6, 1876, giving effect to what is known as the '*premium bond plan*,' does not hold out to the bondholder the delusive hope of payment in the distant future, which flitters around Act No. 5 of 1870; it cuts him off absolutely, unless he will accept the conditions of the proposed plan" (page 363.)

The Court then states the substance of that plan, and then proceeds: "Under this plan the city is released from payment of the principal or interest of its debt, except such portion as may be drawn from the lottery each year. As justly observed by counsel in one of the cases before us, under this arrangement, whether a creditor will be paid in one or fifty years, will depend upon the turn of a wheel and the drawing of a lucky number. Of course this plan disregards all the terms upon which the outstanding bonds of the city—and, among others, those held by the relator—were issued, and postpones indefinitely the payment of both their principal and interest. * * *

"It is plain that if the provisions of this act can be sustained as a valid exercise of legislative power, the judgment of the relator is practically annulled or rendered so uncertain of payment as to be of little value.

"When the bonds were issued upon which the judgment was recovered, the city was by its charter invested with all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same, and it could have provided the means, by taxation, for their payment when they became due. As we said in the case already cited, the power of taxation is an incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, 'in the proper government of the same,' be done" (pages 364, 365).

And the Court sums the whole matter up as follows: "The Courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the

municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by *mandamus* compel at the instance of parties interested, the exercise of that power as if no such legislation had ever been attempted. And that the relator seeks to have done here.

"Following the doctrine of *Von Hoffman vs. The City of Quincy*, we are of the opinion that the Act of March 6th, 1876, the provisions of which we have stated, is invalid so far as it limits the power which the city possessed, when the bonds upon which the relator has recovered judgment were issued, to levy a tax for their payment. In thus limiting the power without providing other adequate means of payment of the bonds, the legislature has impaired the obligation of the contract between her and the city" (pages 368-369). And the Court accordingly reversed the judgment of the Court below, and directed the writ of *mandamus* to issue.

This case would seem to leave little to be said on this branch of the subject. It sweeps away all those cunningly devised acts of the Legislature of Louisiana, which are interposed in this case between us and the city.

It decides that we are entitled to remedy by *mandamus* to compel the city to levy such tax or taxes, as we were entitled to at the time when our bonds were issued; and all subsequent legislation limiting the powers of the city to tax, or altering the method of taxation, must be disregarded and treated as if it never had been.

D. H. CHAMBERLAIN,
WM. B. HORNBLOWER,
Of Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
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Supreme Court of the U. S.

October Term, 1881.

THE STATE OF LOUISIANA, EX REL.
SOUTHERN BANK,

vs.

THE CITY OF NEW ORLEANS, ET AL.

J. A. CAMPBELL,
Attorney for Plaintiff.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

Supreme Court of the United States.

October Term, 1881.

No. 217.

THE STATE OF LOUISIANA, EX. REL. SOUTHERN BANK.

vs.

THE CITY OF NEW ORLEANS, ET. AL.

FROM THE SUPREME COURT OF LOUISIANA.

THE PLEADINGS AND JUDGMENTS.

In 1877, this plaintiff petitioned the Third District Court of New Orleans to direct a writ of mandamus to the defendants, to fulfil the duty imposed upon their City Council in two Acts of the General Assembly of the State, promulgated as Acts Nos. 71 and 72 of February, 1852, to assess, collect, and apply a specific sum of money by taxation, to the payment of the interest and principal of the consolidated debt of the city of New Orleans, every year.

The 37th Section of Act 71, and the 5th section of Act 72 are set out in this petition. The debt, the default in the payment of the interest, and the failure to assess or collect the sum required, and the right of the plaintiffs as bondholders are set forth therein

and are not contested. There were interventions of other parties in this suit who sustained the case of one or other of these parties, but their interventions do not in any manner affect the questions in the Court, and they were immaterial parties to the suit.

The case was decided upon the issues between the plaintiffs and the defendants. The Third District Court sustained the claims of the plaintiffs for a judgment. This judgment was reversed, on an appeal, in the Supreme Court, and the petition was dismissed.

That judgment is brought to this Court under the 709th section of Revised Statues. The judgment of the Supreme Court of Louisiana was founded upon the objections of the defendants to the validity of the Acts of 1852 above mentioned. These objections, we shall state in the next section.

II.

The defendants objected that the enactments of the General Assembly, 71 and 72 entitled, "An Act to consolidate the city of New Orleans, and provide for the government and administration of its affairs," and its supplement did not disclose in that title the object or objects which are contained in the sections quoted in the petition ; that the Article 118 of the Constitution was thus violated, and the sections did not oblige the city of New Orleans. The Supreme Court in its decision in this case did not sustain this objection, and declared that the Act of consolidation of four corporations into one, and providing for government and administration in the new city, might fairly include an arrangement for settlement of their debts.

2. The defendants also objected that the city of New Orleans had been exempted by two separate Acts of the General Assembly from the operation of the writ of mandamus. Act No. 5 of the extra session of 1870, and Act No. 31, of the session of 1876, and pleaded by the city.

The Court in its opinion speak of these Acts with favor, but as understood, the Court's opinion does not rest their judgment upon these Acts.

These Acts have been considered by this Court in the cases of
City of New Orleans vs. Wolfe, 103 U. S. R., 386.
U. S. vs. New Orleans, 98 U. S., 358.

The Supreme Court of the State of Louisiana have also examined them in Moore vs. City of New Orleans, 32 Ann. 726, 738, 741, 751, 763, and not with the same favor as the Court of 1878 gave.

3. The defendants also objected that the Article 127 of the Constitution of 1845, and continued in the Constitution of July, 1852, was a bar to the demand for the enforcement of the Acts of February, 1852. This section is: "Taxation shall be equal and uniform throughout the State. After the year 1848, all property on which taxes may be levied in this State, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied."

The taxes imposed in the sections of Acts 71 and 72, are confined to immovable property, (lands and slaves,) and are imposed upon these differently, in the different sections of the Consolidated city. Each municipality was to be assessed to pay its own proper and particular share of the debts that had been previously and respectively contracted. The Supreme Court sustained this objection as fatal to the plaintiffs' suit.

4. There are motions made by the defendants to dismiss the writ of Error, because this Court has no jurisdiction; and because the relator has no more interest in the prosecution of the writ of Error sued out in this case. No federal question, the appellees affirm, has arisen in the decision by the Supreme Court of Louisiana; and the relator has been forced to sell their bonds on the specifications of the appellees and is no longer an owner of bonds.

III.

The difference between the section 37 of the Act of 1852, and the assumption contained in the first objection of the defendants, will exhibit and illustrate the change in opinions, and estimates of

obligations which has occurred in thirty years, in the City Councils of New Orleans. The Act of 1852 requires that the first act of government and administration of each Council in each successive year, shall be to pass an ordinance to make a provision to pay the debts which the charter authorizes to be novated, and commands to be paid. The Council which adopted the answer filed in this case, seems to have the opinion that a provision for the payment of the debts of the corporations, is a matter so far foreign and so far remote from any ordinary government or administration of the affairs of that city, as that the one does not suggest nor disclose the other as an obligation or a duty of administration or of government of the city.

City of Shreveport vs. Jones, 26 Ann., 708.

Maenhout vs. New Orleans, 2 Woods, C. C., 108.

Society of Savings vs. New London, 29 Conn., 174.

As to such pleas—

Grayson vs. Lilly, 7 Monroe, 12.

2. The two Acts of Louisiana upon the subject of the exemption of the city from the authority of the Courts, for a failure to fulfil their obligations, do not apply to the case before this Court. The 37th section of the Act of 1852, was designed to enable the city of New Orleans to make a distinct proposition to creditors for the liquidation of existing urgent and onerous obligations. The city asked them for a credit not to exceed forty years, and undertook to fulfil the obligation to be contracted according to the conditions of that section of that Act by an annual tax for the purpose. The mandamus asked for by us does not require of the officers of the city to pay an account, or a claim, but to fulfil the Act. The command is to pass an ordinance which the Act requires to be passed; to assess and collect the tax agreed upon, and to apply it in the future as the Act directs.

The claim under this Act for a mandamus would not be answered by the payment of the arrearages of interest. The officers were bound to do this Act, and nothing was legal until this duty was discharged, that the City Councils might do without it.

The promises of the Act are for a specific sum for a specific purpose, in which each separate bondholder has the same legal right as the relator.

Douglass vs. Chatham, 41 Conn., 233.
Burr. on Tax., 453.
Cooley on Tax., 524–5.
Dill Mun. C., section 688.

3. The Act No. 31 of 1876, is in effect and purpose an Act of bankruptcy. In respect to the holders of consolidated city debt, it is an Act of fraudulent bankruptcy. The Supreme Court of Louisiana in the case of Moore vs. city of New Orleans, 32 Ann., is an adequate authority for this conclusion. This Court in Wolfe vs. New Orleans, 103 U. S., is an authority to the effect that the declaration and legislative action consequent, cannot prevail under the Constitution of the State or the United States.

4. The Act No. 31 of 1876, pleaded by the defendants, avows that the embarrassments of the city because of debt, arises out of reckless expenditures by the city government, and we aver these were inhibited by the sections of the charter of 1852, we quote in the petition.

But the Act of 1876 was framed to kill the physician, and to give the fee to those who caused the disease. This Act was designed to compel all holders of bonds to surrender them for bonds of $20 each, to bear interest at the rate of five per cent. annually. The plaintiff would have consented to a reduction of interest. The Act proceeds that there shall be no tax collected to pay any bonds except these premium bonds, and that all laws previously passed for that purpose were repealed, and none in future should be passed till all premium bonds were paid. The promises are much alike those contained in the Acts of 1852 under consideration. The Act proceeds to prohibit the collection of any tax beyond one half of one per cent. upon property, for the execution of the Act, this being a fraction more than one-fourth of the sum needful to pay the interest on the debt, the Act admits to be due to bondholders.

This tax amounting to about $300,000 annually, was to be divided into two parcels, to form the subjects for lotteries in New Orleans. There was a lottery semi-annually for the payment of such bonds as would consume two hundred thousand dollars, of the three hundred thousand dollars. The premium part of the scheme involved the use of $100,000 annually for two drawings.

This sum was divided into 1176 prizes at each drawing, and did not answer as payment of the debt. Every bond was a ticket in each lottery.

The Act of 1876 said to the bondholders, take this, or nothing. As the plaintiffs did not accept, the answer of the corporation is that there can be nothing done for the plaintiffs. The Supreme Court of Louisiana did not place their judgment upon the validity of this Act.

5. We come now to the case which the Supreme Court has made for the examination of this Court. The Constitution of 1845 in force in February, 1852, upon the subject of taxation is quoted: Taxation must be uniform and equal throughout the State—property of the same species must be taxed ad-valorem and not otherwise. The settled jurisprudence of the State has been that municipal and local taxation was excluded in this Constitution, from the conditions imposed in the section we have quoted. We have cited

Municipality vs. Duncan, 2 Ann., 182.
Lafayette vs. Cummings, 3 Ann., 673.
The State vs. Poydras, 9 Ann., 165-8.
Wallace vs. Shelton, 14 Ann., 498,

and other cases.

2. The Constitution did not require all property to be taxed, but by the terms allowed a selection of objects.

The State vs. Lathrop, 10 Ann., 398.
New Orleans vs. Commercial Bank, 10 Ann., 736.
Parker vs. Scogin, 11 Ann., 629.
Honald vs. New Orleans, 23 Ann., 726.

3. The Supreme Court of the State sustained municipal taxes confined to real estate in a number of instances.

Police Jury vs. McDonogh, 8 Ann., 128.
Parker vs. Scogin, 11 Ann., 629.

4. The Supreme Court did render judgements against taxpayers of New Orleans in favor of New Orleans, upon tax bills in which the tax specified in this Act is comprised as a part of the judgment.

New Orleans vs. Cochrane, 8 Ann.
Same vs. Solomon, 10, Ann., 454.
Same vs. Loche, Ibid., 730.
Same vs. Cannon, Ibid., 732.
Same vs. Michaud, Ibid., 763.
Same vs. Halfman, 11 Ann., 145.
Richardson vs. Morgan, 16 Ann., 429.

In none of these suits was the validity of the tax assessed to pay the consolidated loan tax impugned. In the case of Michaud, an objection was made to the tax as oppressive and unequal, but the Court referred the appellant to the legislature, and awarded judgment for the amount of the tax according to the Act.

6. The Acts of February, 1852, were superinduced by what was deemed to be an actual and overruling necessity. In 1836, the General Assembly consented to the dissolution of the existing corporation of New Orleans, and constituting instead three municipal corporations with powers of government and administration over the same district. In 1852, these three municipalities had fallen into conditions of discredit, of imbecility and of disorder. The consolidation of the municipalities, and the suburb Lafayette under one government; the assumption of the debts of each by this government; the distribution of the debts that had been separately contracted, so as to occasion no injustice or wrong to any of them, was the problem to be solved by the legislative power of the State.

The Acts Nos. 71 and 72 were passed to accomplish the objects which the municipalities and the State proposed, as indispensible for the public welfare.

The sections 37 of Act No. 71, and 5 of 72, were administered by the consolidated city until about $9,000,000 of bonds had been issued by the City Council after the debt had been fully canvassed by the officers of the city as those Acts required. Some two or three years were employed, as this record shows, in concluding the settlements which the Acts commanded.

7. It must be remembered that the city of New Orleans and its population were consulted as to the charter of 1852. This population had representatives in the General Assembly. They chose the city government after the charter came into existence. The taxpayers received notices and paid the assessments. There were ordinances respecting the proof of the debts, and advertisements to creditors.

The generation that were interested in these demands and this legislation, consented to every part of it. It is a generation that had no conversation with the creditors that existed; nor with the counsels that prevailed, nor the Acts done that makes the controversy. A new generation that had no knowledge of Joseph, have come to discover that the signification of the title of the Act was imperfect, and that taxation was illegally promised and applied for twenty-five years.

8. Suppose the municipalities to have been continued and no consolidation to have taken place, would not the municipalities have remained separately obliged for their debts as before the consolidation? Would not the houses on opposite sides of Canal street been assessed to pay differing rates? The notion of the Supreme Court that a consolidation of the municipalities necessarily involved a distribution of the debts among all, and the same rate of taxation among all, is without a foundation in constitution or law. Had there been no consolidation, taxation might have been applied so as to place the obligations upon the *real property* of the city for the whole amount required, the cases above cited show this.

9. The world has been greatly disturbed in this epoch by the consolidation as well as the disintegration of empires and states, as well as of counties and of towns. The subject of the apportionment of their debts, surely has not resulted in establishing any rule

like that the Supreme Court of Louisiana seem to have had some impression had some existence. Sometimes it has happened that the debts of the different states are assumed by the consolidated empire or kingdom. In general this may be stated as the rule adopted by Prussia and Italy in the additions made to those kingdoms. The United States paid a portion, not all, of the debts of Texas. Belgium and Holland made a partition of debts and property. The general inclination is there should be a partition, upon the basis of population, or of resources or some other equitable mode. Some suppose that a ceded or separated section shall not pay any of the debt. West Virginia is charged with holding the opinion. The common opinion is that when several States unite, each remains liable for her personal debts.

Selosse de l'annexion, 163, 182.
1 Calvo, Droit Int., 216.
Bluntschli, Code, Nos. 56, 61.
W. E. Hall's Int. law, p. 78, 86, note.

The full discussion made in this Court in the case cited from 2 Otto on the brief, shows how far from the truth are the "Guesses at Truth," found in the opinion we have been considering in this cause.

Mount Pleasant v Beckwith — 10 Otto — 514 IV.

1. The statements we have made sufficiently show that the motion to dismiss the cause for want of jurisdiction, because the Supreme Court was expounding the Constitution of the State and the laws of the State, has no stable foundation. The Constitution of the State warranted the legislation of 1852.

The authorities of the State have affirmed for near a quarter of a century, the validity of these Acts. They have been acknowledged among the people they most concerned, with unanimity.

The opinion of the Supreme Court is inefficient to disturb the Constitution, the law and the contracts under both the Constitution and the law. These have been impaired and set aside by the State authorities.

2. The motion to dismiss because the relator has parted with the interest, is untenable. The case comes before the Court upon the application of the party on the record. The party on the record is represented in this Court by the counsel that represented the case in all of the Courts. There has been no release of Errors, nor is there any assent that grievance has not been suffered as shown in the petition for the writ of Error. So it is manifest that this suit has been commenced and is prosecuted to assert a real right aggrieved by unwarranted legislation. The record shows that the plaintiff or relator acted for all the bondholders, and the relief granted according to the prayer of the petition enures to all who are interested. Six hundred and thirteen bonds were produced and proved, and the existence of others established.

The counsel representing the cause in this Court, does so at the instance of parties on the record of the case, and I stand in this Court at the instance of the owners of the bonds proved in the Court below, for the most part, and with the approbation of owners of all.

J. A. CAMPBELL,

For the Plaintiff in Error.

U. S. SUPREME COURT.

No. 217.

THE STATE Ex REL. THE SOUTHERN BANK

vs.

THE CITY OF NEW ORLEANS.

Brief of Defendant in Error, in support of motion to dismiss Writ of Error on the ground that the Relator in Error, has parted with its interest in the suit.

The Defendant in Error moves to dismiss the Writ of Error in this case, upon the ground, that the Southern Bank, the Relator and Plaintiff in Error, since the Writ of Error was sued out, has parted with and disposed of the Consolidated bonds of the city of New Orleans, the basis of the Relator's demand, which is to compel the levy of a tax to pay the bonds.

When the suit was brought in the State Court, the Bank held, as alleged in its petition, six hundred thousand dollars of these consolidated bonds. See petition, Record, p. The Bank failed, and was put in liquidation in March, 1879.

In one of the briefs filed on behalf of the Bank in this Court, there is the statement that the bonds owned by the Bank have been pledged to New York and London correspondents, and unless the suit be advanced, the pledgees may become impatient and alarmed and sacrifice the securities by selling them out, etc., as appears by the copy of the brief annexed. See exhibit No. 1, filed with this motion.

These pledgees, as shown by the affidavits, were the London Joint Stock Bank, of London, and the Chemical National Bank of New York, and the fact that they have disposed of the securi-

ties appears by the affidavit of Samuel H. Kennedy, President of the State National Bank, showing that the bonds pledged to the London Joint Stock Bank have been sold, marked Exhibit No. 2, the Record of suit of the Chemical National Bank of New York vs. the Southern Bank, for a decree of the sale of the pledged bonds and affidavit of the auctioneer who made the sale of the bonds, marked Exhibits 3, 4, 5 and 6, and by the affidavit of the Mayor of New Orleans to the facts, marked Exhibit No. 7, all of which exhibits are herewith filed.

It thus appears, that neither the Southern Bank, the Relator or its pledgees, have any right now or interest in the Consolidated bonds, the basis of the Bank's demand in the State Court and in this Court. It is clear the suit can not be maintained by the Southern Bank, the Relator here, shown to be without interest in the controversy.

The defendant therefore submits the motion should prevail, and if any controversy arise respecting the facts, on which the motion is based, that the cause be remanded to the State Court to determine the issue.

Respectfully submitted,

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Attorneys for City of New Orleans, Defendants in Error.